LIBRARY
SUPREME COURT, U. S.

No. 969
(Consolidated with Nos. 800 and 946)

Office Supreme Court, U.S.
FILED
APR 25 196
JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AMERICAN SOCIETY OF TRAVEL AGENTS, INC.,
Petitioner,

v.

PAN AMERICAN WORLD AIRWAYS, INC., TRANS WORLD AIRLINES, INC., and AMERICAN AIRLINES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONER, THE AMERICAN SOCIETY OF TRAVEL AGENTS, INC.

CHARLES A. HOBBS,
Counsel for Petitioner,
The American Society of Travel Agents
1616 H Street, N.W.
Washington, D.C. 20006

WILKINSON, CRAGUN & BARKER
GLEN A. WILKINSON
PAUL S. QUINN
Of Counsel

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
1. The Scheduled Carriers Have Not Dealt With The Basic Issue, Which Is, Are Inclusive Tour Charters Individually Ticketed Transportation	1
2. The Scheduled Carriers Have Misread the Legislative History and the Background to the 1962 Act	5
3. The Interstate Commerce Commission Practice Allowing ITCs by Charter Motor Bus Carriers is Comparable to the Board's Rules Allowing ITCs by Supplemental Carriers	7
4. Respondents' Procedural Contentions Are Without Substance and Should Be Disposed of Here Without a Remand	11
CONCLUSION	13

TABLE OF CITATIONS

Cases

Air Freight Forwarder Case, 9 C.A.B. 473 (1948)	6
American Airlines v. *CAB*, 178 F.2d 903 (7th Cir. 1949)	6
American Airlines v. *CAB*, 98 U.S.App.D.C. 348, 235 F.2d 845 (1956), *cert. den.* 353 U.S. 905	5
American Airlines v. *CAB*, 365 F.2d 939 (D.C. Cir. 1966)	6
Greyhound Corp. v. *Edwards*, 96 M.C.C. 112 (1964)	8, 10
Greyhound Corp. v. *Edwards*, 100 M.C.C. 453, (1966)	11
Matter of People (Russian Reinsurance Co.) 255 N.Y. 415, 175 N.E. 114 (1931)	13
Tauck Tours Inc., Extension—New York, N.Y., 49 M.C.C. 491, 52 M.C.C. 373, 54 M.C.C. 291, 63 M.C.C. 493, action to set aside dismissed, sub nom. *National Bus Traffic Assn.* v. *United States*, 143 F.Supp. 689 (D.N.J. 1956), aff'd 352 U.S. 1020	8, 9
United Airlines v. *CAB*, 108 U.S.App.D.C. 1, 278 F.2d 446 (1960)	5

Others

	Page
14 C.F.R. Part 296	6
14 C.F.R. § 378.2(d)	4
49 U.S.C. § 303(a)(18)	8
49 U.S.C. § 1301(33)	2
49 U.S.C. § 1371	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 969

AMERICAN SOCIETY OF TRAVEL AGENTS, INC.,
Petitioner,

v.

PAN AMERICAN WORLD AIRWAYS, INC., TRANS WORLD AIRLINES, INC., and AMERICAN AIRLINES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF OF AMERICAN SOCIETY OF TRAVEL AGENTS

---

1. The Scheduled Carriers Have Not Dealt With The Basic Issue, Which Is, Are Inclusive Tour Charters Individually Ticketed Transportation

The scheduled carriers avoid the basic question at issue by assuming its answer. Throughout their "Statement of the Case" (pp. 3, 6, 30, 33, 41), and argument, they profess to assume that inclusive tour charters (ITCs) are individually ticketed transportation, and devote their energy to proving the other premise, which we freely concede, that Congress intended to prohibit the supplementals from engaging in individually ticketed transportation.

The case is not so simple. While it is true that Congress intended to prohibit the supplementals from providing "individually ticketed" transportation, the threshhold question remains, what does that mean? In the context of this case, at least, it is clear that "individually ticketed" traffic is a term intended to describe the scheduled, point-to-point traffic that the route carriers customarily transport. This is confirmed by the very language of the 1962 Act, which confines the supplemental carriers to charter transportation which supplements *"the scheduled service* . . . ." 49 U.S.C. § 1301(33).

Inclusive tour charters are inherently distinct from individually ticketed, or scheduled service, because with ITCs there is no offering, attraction, or providing of plain point-to-point transportation, which after all is the *raison d'etre* of the scheduled carriers, and all that they are entitled to competitive protection for.

The scheduled carriers suggest (p. 51-52, 56) that the fact that ITC passengers are solicited from the general public makes ITCs illegal. But it is of no significance per se that the market being solicited by the tour operator is the "general public." The real question is whether the solicitation attracts and diverts that part of the general public which would otherwise travel on the scheduled services. If so, then the charter on which the diverted passengers travel does not "supplement the scheduled service," and might indeed be contrary to the intent of the cases, discussed at pp. 8-12 below.

As we pointed out in our main brief (pp. 26-31) the Board has found, with ample support, that diversion from the scheduled carriers would not be significant. The British, who have had over 16 years' experience with ITCs, have said there has been no material diversion. The Interstate Commerce Commission has not found diversion significant with respect to ITCs by motor bus.

The Court may be interested in some statistics on ITC operations to date, which seem to confirm the British and

U.S. motor carrier findings of little diversion. In the domestic area, by far the most popular ITCs to date have been to Hawaii. In 1967, 51,340 passengers travelled to Hawaii on ITCs.[1] This year, 1968, if only one-half of the ITCs so far authorized are in fact operated (assuming full planeloads), some 140,000 tourists will visit Hawaii on ITCs.[2] Notwithstanding this growth the scheduled services of the scheduled domestic carriers have likewise made striking strides forward. Thus, from the strike year 1966, during which such carriers moved 1,090,000 passengers to Hawaii, the figure increased to 1,722,000 in 1967, and will increase to an estimated 2,066,400 passengers in 1968. In spite of the growing inclusive tour program, no impact on the regular services of the trunk carriers is evident and their financial prospects are excellent.[3] We suggest that the heavy promotion of ITCs to Hawaii has actually had some direct effect in increasing the scheduled carriers' traffic to Hawaii, by implanting the desire to go to Hawaii in persons who are unwilling or unable to do so via ITCs.

At p. 64 (also pp. 45 and 52), the scheduled carriers argue that allowing supplementals to operate ITCs through "travel agents (or 'tour operators')" would be to "permit them to do indirectly and through a subterfuge what they clearly could not do directly."[4] This argu-

[1] The data in this paragraph were furnished by CAB sources: *CAB Competition Study*, 1966; CAB Form 41 Reports for 1967 for Domestic Trunk Delta; inclusive tour data from inclusive tour applications, and reports and estimates by the Board's Bureau of Operating Rights.

[2] Experience here and in Britain is that many more ITCs are authorized than are actually operated. Non-operation occurs when the tour operator finds that the tour cannot be marketed anywhere near break-even.

[3] See our main brief, pp. 29-30, where the British ATLB noted that British European Airways' (a scheduled carrier) traffic continued to grow at much the same rate as before ITCs became popular.

[4] At p. 63 (and p. 45) the scheduled carriers say that the Board and the supplemental carriers concede that the supplementals cannot

ment, incidentally, was made and rejected in the bus ITC cases, discussed at pp. 7-11 below.

In the first place, the tour operator is no subterfuge or front for the supplemental carrier. He is an independent merchant producing something of value to the public—by using his volume discount power, at his own personal risk, he contracts for the various tour elements, and offers the tour for less than the tourist would pay if he purchased the elements separately. The carrier does not share the risk; it must receive its full tariff price for the charter no matter how many tourists are carried. Since the carrier does not share in the profit or loss of the tour venture, it is doing nothing "indirectly" that it is prohibited from doing directly.

In the second place, even if the tour operator were a front for the carrier, this would not really affect the inherent validity of ITCs, because the significant inquiry is who is *being* solicited to join the charter group, not who is *doing* the soliciting. If the tour participants produced by the solicitation consist of point-to-point travelers diverted from the regular scheduled traffic of the route carriers, then the charter is bad, irrespective of whether the tour operator, the supplemental or someone else solicited the business. On the other hand, if the solicitation produces a bona fide group of tour participants who would not have used the scheduled services of the route carriers, then the charter is in the public interest and achieves what the Board intended.

There is a significant omission in the scheduled carriers' brief. There is no attempt to refute the Board's find-

---

themselves sell inclusive tours. This is not so. The sole support for this claim is a vague, passing reference in the Board's opinion in the Supplemental Air Service Proceeding, App. 345a. In fact, the question of whether the supplementals could provide charter service by inclusive tours for groups assembled by the supplementals has never been squarely raised before or decided by the Board. It is not relevant to the determination of this case since the Board has provided by regulation that the Supplementals may not serve as tour operators. 14 C.F.R. § 378.2(d), App. 418a.

ings that ITCs would have no significant impact on the scheduled carriers. As critical as the diversion issue is in this case, illuminating as it does the legislators' speeches and the proper policies to be followed by the Board, one can only note surprise at the strange silence on the point.

2. The Scheduled Carriers Have Misread the Legislative History and the Background to the 1962 Act

At p. 9, n. 12, and again at p. 12, n. 15, the scheduled carriers deny that the Board had power to allow ITCs prior to the 1962 Act. As we briefly mentioned in our main brief, p. 23, n. 95, there was never any question prior to 1962 about the supplementals conducting *charter* operations; the doubt was focussed on the individually ticketed, scheduled operations. In other words, the Board had statutory authority to allow the supplementals to carry charters, including ITCs or any other bona fide charter, certainly under a certificate,[5] and probably under an exemption as well. The doubt that the 1956 *American Airlines* case [6] cast on the exemption procedure arose not from the charter aspect, but from the fact that the supplemental carriers were authorized to perform some scheduled individually ticketed service, and this made their operations "much closer to the certificated services." [7] The District of Columbia Court was entirely correct when it noted that "the Board had preexisting authority to determine the definition of charter . . . ." (i.e., to allow ITCs), and that "Congress did not intend to withdraw this authority." 365 F.2d at 944.

---

[5] 49 U.S.C. § 1371. The certificate must name the terminal and intermediate points of service, § 1371(e)(1), *United Airlines* v. *CAB*, 108 U.S.App.D.C. 1, 278 F.2d 446 (1960), but *charter* service can be provided without regard to the points named, § 1371(e)(6) (amended in 1962 not to apply to supplementals).

[6] *American Airlines* v. *CAB*, 98 U.S.App.D.C. 348, 235 F.2d 845 (1956), *cert. den.* 353 U.S. 905.

[7] 235 F.2d at 853.

The primary reason the Board sought legislation was to enable it to authorize the supplementals to perform individually ticketed operations, authority the courts had held it lacked, but of course Congress refused to grant that authority.

This fact is what the House Report referred to when it said the bill gave the Board "some, but not all, of the authority requested by" the Board (Resp. Br. 13, 22), and it is what Chairman Boyd referred to when he said the Board's bill was designed "to correct the deficiencies in the Board's legal authority which were found to exist by the court." (Resp. Br. 14.)

At p. 9, the scheduled carriers quote ASTA as saying the inclusive tour charter "was not then known in the air travel industry in this country." Our statement is perhaps more significant for what it did not say than for what it said. The fact is, the inclusive tour charter concept *was* known—well known and successful—just about everywhere else *except* the air travel industry in this country: It was well known in *surface* transportation industry in this country.[8] It was well known in the air *freight* industry in this country.[9] And it was well known in the air travel industry *outside* of this country.[10] The

---

[8] As fully outlined below, pp. 7-11 with respect to bus charters. There are no restrictions on a tour operator chartering railroad cars or steamships. The ITC question has not arisen in these fields, because the competitive structure is not the same as it is in the bus and aircraft field; i.e., there is no nonsked v. route carrier interplay in the rail and water fields.

[9] Airfreight charters have not been discussed in the briefs filed to date, yet they are very similar to ITCs. The airfreight forwarder is authorized to assemble planeloads of freight and move them by chartered aircraft. The regulations are 14 C.F.R. Part 296, and for litigation approving this type of charter, see *Air Freight Forwarder Case*, 9 C.A.B. 473 (1948), and *American Airlines* v. *CAB*, 178 F.2d 903 (7th Cir. 1949). It seems a bit strange to see a type of passenger charter vigorously attacked, when the same sort of charter is well accepted in the freight field.

[10] As discussed in our main brief, pp. 28-30.

sole remaining holdout was the air travel industry in this country.

At p. 16, and again at 43-44, and again at 52, the scheduled carriers make an impermissible error in characterizing the testimony of Mr. Burwell (who represented the supplementals before Congress). They say that "He testified that all-expense tours were not charter trips . . . ." This is completely false. As his testimony set forth in respondents' brief, p. 17, shows, he said they were not charters "*under the present Board rules.*" That was the whole purpose of the Senate proviso—legislatively to *overrule* the Board's rule against ITCs, so as to *require* the Board to allow them. There was never any suggestion from Mr. Burwell that ITCs were not a proper form of charter under common law principles, which look only to the arrangement between the charterer and the charteree, without regard to what *use* the charter was to be put to. That is, ITCs are being challenged here as an improper form of charter, not because of the arrangement between the charterer and the charteree, which is a classic charter by any common law test, but solely because of the use to which the charter is to be put, a use which raises questions of national economic policy, not common law definitions of charter.

3. The Interstate Commerce Commission Practice Allowing ITCs by Charter Motor Bus Carriers Is Comparable to the Board's Rules Allowing ITCs by Supplemental Carriers

At pp. 68-71 the scheduled carriers attempt to explain away the simple fact that ITCs are allowed in the motor bus industry.

Under the Interstate Commerce Commission practice a travel agent or tour operator may be licensed as a "broker" of bus transportation. As such he may solicit passengers and arrange with a bus carrier for their trans-

portation.[13] However, the type of traffic solicited determines which type of bus service he may use for the transportation. There are three types of bus service—regular-route, special operations, and charter.[14] If the group solicited wishes only point-to-point transportation, the broker must use a route carrier. On the other hand, if the group has a joint purpose other than mere transportation, he may use a charter carrier.[15] As the ICC regulations put it, the charter bus operator is prohibited from transporting—[16]

> ". . . passengers to whom individual tickets have been sold or with whom separate and individual transportation arrangements have been made."

The concern of the ICC is obviously parallel to that of the Board: to prevent charter carriers from depriving scheduled route carriers of individually ticketed point-to-point traffic—business which is reserved for the scheduled route carriers.

The ICC several times has considered the question whether sightseeing or other special purpose groups are eligible for carriage by chartered bus. In *Tauck Tours*,[17] a tour operator proposed to charter buses from charter bus carriers, and use them to transport groups of sightseeing tourists, which he had solicited and brought together, from New York, Newark and Philadelphia to vari-

---

[13] 49 U.S.C. § 303(a)(18), and see § 311.

[14] This is fully explained at *Greyhound Corp.* v. *Edwards*, 96 M.C.C. 112, 118 (1964). Respondents (p. 69) do not appear to realize that bus charter authority may be held by specific ICC grant, as well as as an incident to route authority. See the *National Bus Traffic Assn.* case, note 17 below, 143 F.Supp. at 692 and 693.

[15] See the *Edwards* case, 96 M.C.C. at 118-119.

[16] Id. at 118.

[17] *Tauck Tours Inc., Extension—New York, N.Y.*, 49 M.C.C. 491, 52 M.C.C. 373, 54 M.C.C. 291, 63 M.C.C. 493, action to set aside dismissed, sub nom. *National Bus Traffic Assn.* v. *United States*, 143 F.Supp. 689 (D.N.J. 1956), aff'd 352 U.S. 1020.

ous points in the United States and Canada. The tourists paid a lump sum in advance for the various elements of the tour. The Examiner denied permission to do this, on the ground that Tauck was not a broker, but a common carrier.[18] A division of the Commission reversed and approved the proposal, but on condition that Tauck use regular route carriers, not charter carriers.[19] The division then reconsidered, and held that charter carriers could be used after all, and the full Commission affirmed.[20] The Commission reasoned that Tauck's patrons, traveling and sightseeing together, had a "community of interest" the equivalent of that of a pre-formed group, which clearly could charter.[21]

The route carriers took the case to a 3-judge federal court, claiming that Tauck's proposal permitted the charter carriers to carry individually ticketed traffic.[22] The court affirmed with a careful opinion, saying: [23]

> "Though the individual membership certificates do entitle each individual Tauck patron to transportation and in this sense are 'tickets,' a good deal more than bare individual transportation is involved. The tour is attractive because it is a group adventure. Few people travel to look alone upon Niagara Falls or the Grand Canyon of the Colorado. Whether the group be formed by Tauck before or after the charter of

---

[18] See 143 F.Supp. at 691.

[19] Id.

[20] Id. 691-692.

[21] Id. at 695. Note: the technical form of the bus charter was a charter between the tourists as a group and the carrier, whereas the ITCs in this case are between the tour operator and the carrier. This difference is merely technical, as in both cases the essential element is that the tourists are solicited and assembled by the tour operator, and in both cases the essential question is whether the tourists were diverted from the scheduled traffic.

[22] *National Bus Traffic Assn.* v. *United States*, 143 F.Supp. 689 (D.N.J. 1956), aff'd 352 U.S. 1020.

[23] Id. at pp. 696-7.

> the motor bus seems unimportant; nor does it seem a weighty circumstance that Tauck itself forms the group and not some outside individual, such, for example, as a ski instructor at a ski resort. The important thing is that the Tauck group is a cohesive whole interested in a tour for pleasure, and not in mere transportation."

In its most recent decision, *Greyhound Corp.* v. *Edwards*,[25] the Interstate Commerce Commission again reaffirmed its ruling in *Tauck*. This time, three variations of inclusive tour charters were brought under scrutiny. In one, a travel agent chartered buses to carry passengers from Erie to Cleveland and back the same day, for shopping tours. The only non-transportation element was a luncheon ticket which entitled the passenger to a 75-cent discount at a Cleveland restaurant. The Commission held this type of charter unlawful on the ground that it was too much like straight transportation.[26]

The second type of charter involved hockey excursions. The travel agent offered a charter tour from Erie to Buffalo, featuring a reserved seat at the rink, and a dinner. The Commission approved this type of charter, on the ground that:[27]

> "Unlike the defendant's shopping tours, his hockey excursions, because of the significant nontransportation features involved, would not be attractive to persons desiring transportation and having no interest in the advertised purpose of the tour. In other words, it is inconceivable that any significant number or persons desiring round trip transportation between Erie and Buffalo for other purposes would pay for the unexercised privilege of eating with hockey fans and sitting with them at the game."

---

[25] 96 M.C.C. 112 (1964).

[26] Id. at 122.

[27] Id. at 123.

The third type of charter involved bingo games. A travel agent in Milwaukee chartered buses to carry his patrons to bingo games in various towns in Illinois, and back. The price of the bus ticket did not include admission to the games, or meals; however, the travel agent did notify the bingo parlors how many tour patrons to expect so that sufficient food would be available. While conceding that it was a close question (because of the absence of nontransportation elements), the Commission approved this type of charter:[28]

> "In addition to the existence of strong and specific community of interest among the tour patrons, the complainant has failed to show that the operations of the defendants pose any significant threat to the operations of regular-route carriers of passengers. Moreover, the evidence of record suggests that the possibility of any such injury is extremely remote."

The foregoing decisions were affirmed by the full Commission on reconsideration.[29]

It is clear that the ICC has authority to define charter to include certain kinds of ITC. There is no reason why the CAB does not have the same authority, unless Congress took it away. As fully discussed in our main brief, the 1962 Act did not take it away.

4. Respondents' Procedural Contentions Are Without Substance and Should Be Disposed of Here Without a Remand

Respondents argue at some length (Resp. Br. 73-81) that the Board unlawfully deprived them of a hearing. The fact is otherwise. Every substantive contention underlying respondents' present procedural points was carefully considered by the Board (App. 1063a-1076a), after which the Board articulated sound reasons why in its

---

[28] Id. at p. 124.

[29] *Greyhound Corp.* v. *Edwards*, 100 M.C.C. 453, 464 (1966).

view no further hearing was required. The Board noted specifically (App. 1076a-1077a) that "The route carriers have not come forward with any showing that a reopened record would point to a different conclusion from that adopted herein."

There are two short answers, therefore, to what respondents urge under the present heading.

The first is that the adequacy of the present already lengthy record was a matter committed to the Board's informed discretion. The second is that the matters which the Board officially noticed, of which respondents now also complain (Resp. Br. 77-79), were never sought to be rebutted by them before the Board. Accordingly, they cannot now seek a rehearing on that issue in the courts.

A more extended answer to the trunk lines' procedural objection, fully buttressed by pertinent authorities, will be found at CAB Br. 30-35.

Because the procedural contentions made by the scheduled carriers are so obviously lacking in substance, we urge the Court to dispose of them here, in preference to remanding them for later resolution.

Such a course would have the result, highly desirable as a matter of judicial administration, of terminating the present lengthy proceedings, which have been before the Board and before the courts for almost eight years.

And there are sore practical reasons why the present long standing controversy should at last be brought to a conclusion. As matters now stand, with the statutory word "charter" defined one way by one Circuit in respect of domestic charters, and another way by another Circuit in its application to foreign charters, the planning and marketing of ITCs is being seriously hindered pending a final resolution of the conflict by this Court.

As already pointed out (Supp. Br. 28), the ITC authority is temporary only; the Transatlantic certificates ex-

tend only to April 18, 1969, all other international authority to November 26, 1971. Thus, as a realistic matter, remanding these cases for the determination of the procedural issues would indeed involve what Mr. Justice Cardozo once characterized as "postponement to the Greek Kalends." [30]

CONCLUSION

For the foregoing reasons the judgment of the court below should be reversed.

Respectfully submitted,

CHARLES A. HOBBS,
Counsel for Petitioner,
The American Society of Travel Agents
1616 H Street, N.W.
Washington, D.C. 20006

WILKINSON, CRAGUN & BARKER
GLEN A. WILKINSON
PAUL S. QUINN
Of Counsel

April 25, 1968

[30] *Matter of People (Russian Reinsurance Co.)*, 255 N.Y. 415, 422; 175 N.E. 114, 116 (1931).